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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

**No. 701. Oct. T. 1955**

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

**On Appeal From the United States District Court for the District of Columbia**

**No. 713. Oct. T. 1955**

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*

v.

WALTER KRUEGER

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## FURTHER MEMORANDUM ON BEHALF OF APPELLEE AND RESPONDENT

In its Reply Brief for Appellant and Petitioner on Rehearing, hereinafter cited as U. S. 2d Reply Br., the Government presents historical evidence, so-called, in an endeavor to establish that the traditional British and American military jurisdiction over civilians at the time of the

adoption of the Constitution was not limited to those who served with the armies in a time of hostilities in the theater of hostilities.

That the jurisdiction was legally so limited was the view set forth by Winthrop, who wrote (1336; reprint, p. 101) that the application of AW 63 of 1874 "is confined both to the period and pendency of war and to acts committed on the theatre of the war." We have already shown (Covert Br. 39-41, 44) that this view was shared by other military writers, and, preeminently, that it was supported by published opinions of the Attorney General of the United States and of The Judge Advocate General of the Army.

We point out below that the materials now belatedly adduced by the Government, when examined in context, far from casting the slightest doubt on the traditional view, only confirm it. And we are impelled to file this additional memorandum, which is limited to that single issue, because the implications which the Government seeks to extract from its materials are so completely unsupported thereby that it is necessary to reply in a form more permanent than the essentially evanescent contradiction of oral argument.

## I. THE CONTINENTAL CONGRESS PASSED NO ACT SUBJECTING CIVILIANS TO TRIAL BY COURT-MARTIAL FOR REFUSAL TO TESTIFY.

The quality of the Government's eleventh hour resort to "history" may perhaps be judged from its contention (U. S. 2d Reply Br. 58-60) that the Continental Congress in 1786, while considering a measure providing for "the punishment by court-martial of persons belonging to the forces of the United States who refused to give evidence before a court-martial, struck out the words "belonging to the forces of the United States", citing 30 J. Cont. Cong. 290. This is said to "reflect "a broad view of the reach of the court-martial power" (U. S. 2d Reply Br. 58), and the proposed measure is referred to as a "law" (*ibid.*) and as a "statute" (*id.* at 60).

If, in fact, an act with the words struck out had actually passed, then it would be necessary to determine whether the subsequent reenactment of the Continental Articles of War "as far as the same may be applicable to the constitution of the United States" (Sec. 13 of the Act of April 30, 1790, c. 10; 1 Stat. 119, 121) affected the provision in question.

But it is not necessary to pursue any such inquiry, for the reason that *there never was any such law or statute as the Government sets forth*, with or without the disputed words. Its quotation from 30 J. Cont. Cong. 390 at U. S. 24 Reply Br. 39 shows on its face that this was no more than the discussion of a committee proposal. In fact, *the passage on which reliance is placed never became, in any form, a part of the Articles of War enacted 12 days later, on May 31, 1786.* For the text of what was actually passed, see 30 J. Cont. Cong. 316-322, and Winthrop 1501-1508 (reprint, pp. 972-975). Indeed, the failure or refusal of a civilian to testify before a court martial was not declared criminal by Congress until 1901, and then it was made an offense triable in the civil courts. Sec. 1 of the Act of March 2, 1901, c. 809, 31 Stat. 950. See H. R. Rep. 1853, 56th Cong., 1st sess.; Sen. Rep. 1914, 56th Cong., 2d sess. It has remained a civil offense ever since. AW 23 of 1916 through 1948; Art. 47, UCMJ, now 10 U. S. C. §847.

In short, the Government's last minute "historical" argument is rested on The Statute That Never Was.

## II. THE PRACTICE IN BOTH THE BRITISH AND CONTINENTAL ARMIES DURING THE REVOLUTION DOES NOT REFLECT A MILITARY JURISDICTION OVER CIVILIANS WIDER THAN THE TRADITIONALLY NARROW SCOPE SET FORTH IN WINTHROP AND IN THE PUBLISHED OPINIONS OF THE ATTORNEY GENERAL AND THE JUDGE ADVOCATE GENERAL OF THE ARMY.

The bulk of the "newly-discovered materials" (U. S. 24 Reply Br. 24) now presented by the Government show only what was of course well known, that there were female

camp followers in both armies during the War of the Revolution. But since, as The Judge Advocate General long ago ruled (Dig. Op. JAG, 1880, p. 384; *id.*, 1895, pp. 599, 600; *id.*, 1901, p. 563), "strictly and properly, there can be no such thing as a camp follower in time of peace," the fact that there were camp followers in time of war, that rations were drawn for them, and that they were often dismissed from camp for misconduct (U. S. 2d Reply Br. 27-29, 31-36), proves nothing in the present connection, where we are concerned only with court martial jurisdiction over civilians in time of peace.

Turning first to the American materials, it is plain that the court martial jurisdiction in fact exercised during the Revolution over civilian employees dealt with persons who were functionally connected with the Army, and who were tried in time of war and in the field. U. S. 2d Reply Br. 37-40.

The Government fails to cite a single authenticated instance of the trial of a dependent wife by American court martial, even during the War of the Revolution within the camp of the Continental Army—i.e., in time of war in the field. U. S. 2d Reply Br. 31-37. Thus the Government's present belated attempt fails signally to contradict what we have repeatedly asserted (Covert Br. S. 38, 61-64, 69, 102; Def. Supp. Br. 41), that, over a period of 175 years, from 1775 to 1950, no wife of an American serviceman was ever tried by an American court-martial.

In the British service during the same period, there is shown one authenticated court martial trial of a wife, in Boston, in December 1775. U. S. 2d Reply Br. 30. But this occurred at a time when the British forces in Boston were besieged by the Continental Army (Spaulding, *The United States Army in War and Peace*, 36-40, 44-46), and after General Gage, the British Commander, had declared martial law (1 Ward, *The War of the Revolution*, 61-62). Thus this instance is, in the context of present-day concepts, a martial law situation.

There are six authenticated court martial trials of camp followers, not wives (U. S. 2d Reply Br. 31), all in time of war and in the field. And there are two instances of trials of wives in Canada in 1760 and 1761 (*id.* 30-31), but this was before the Peace of 1763, so that Canada was occupied enemy territory, subject to the laws of war. See Covert Br. 69-76, and note that *Madsen v. Kinsella*, 343 U. S. 341, which involved a similar situation, was not cited by the Court last June, because obviously irrelevant.

The Government's attempt to draw a wider significance from this handful of British trials on the basis that, "from the British point of view at least, there was no war, but merely disorder in the colonies" (U. S. 2d Reply Br. 27-28), breaks down utterly when it is borne in mind that the British accorded full belligerent rights to the American forces and treated captured American soldiers as prisoners of war, not as traitors levying war against the King. Similarly, although the Civil War and almost all of our Indian Wars took place on domestic soil, the United States at all times extended belligerent rights to the Confederacy (cf. *Williams v. Bruffy*, 96 U. S. 176, 186-187), and treated captured Indian hostiles as enemy soldiers who were answerable only to the laws of war. *United States v. Eleven Horses*, D. So. Dak., Winthrop *1212 (reprint, p. 778); *Case of the Modoc Indians*, 14 Op. Atty. Gen. 249.

Thus the British materials now adduced by the Government fail to present a single authenticated example of domestic military jurisdiction exercised over dependents' wives or indeed over any civilians, in time of peace and not in occupied territory or under martial law.

## III. THE BRITISH PRECEDENTS SUBSEQUENT TO 1789 ARE PLAINLY IRRELEVANT TO ANY CONSIDERATION OF THE SCOPE OF AMERICAN MILITARY JURISDICTION.

At the last Term, the Government cited the case of a soldier's wife, convicted of manslaughter by a British court martial in India in 1825. U. S. Reid Br. 34, n. 16.

At the present Term, the Government sets out that case in more detail, and adds another British Indian case from 1825 and one from 1831 "in which court martial of an officer's wife *was considered*". Quotation from U. S. 24 Reply Br. 47-48; italics our own.

In view of the circumstances that all of these instances came long after the adoption of the Constitution of the United States, and that they involved the application of a special Mutiny Act operative only in India (St. 4 Geo. IV, ch. 81), we think it too plain for argument that they are completely irrelevant here. For, as the Solicitor General told this Court in *Madsen* v. *Kinsella*, (U. S. Br., No. 411, Oct. T. 1951, pp. 44-45),

> "the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court-martial jurisdiction then or later."

The circumstance that the Government now stresses the 1825 situation in India which, in 1956 it mentioned briefly and in 1952 dismissed as irrelevant reflects, we think, not the suddenly inflated significance of the British military jurisdiction in the days of the East India Company's vice-regal sovereignty, but rather the paucity of authorities from any other source that are available for citation in support of the Government's position in the present cases. Moreover, we think that the non-adoption by the Continental Congress of the British Article of War granting wider jurisdiction to courts-martial in certain overseas possessions (U. S. 24 Reply Br. 43-44) shows, not that the Continental Congress did not contemplate sending forces overseas—after all, it sent Arnold and Montgomery to Canada, where they captured Montreal and were only defeated at Quebec; and it sent John Paul Jones to harry British shipping in the enemy's home waters—but rather that the Continental Congress was unwilling to authorize a similar expansion of military jurisdiction over civilians. And,

*Duncan* v. *Kahanamoku*, 327 U. S. 304, should caution against acceptance of the too facile assumption that civilians in off shore territories can be subjected to a wider military jurisdiction than at home whenever convenience so suggests.

In any event, even English practices prior to 1776 must always be examined in the context of the provisions and limitations of our own Constitution, and in the light of our own constitutional development. Cf. *Powell* v. *Alabama*, 287 U. S. 45, 65. If, in fact, civilians were tried by court martial in British colonial possessions in the Eighteenth Century (a matter not at all satisfactorily authenticated—if, as we know, they were tried by court martial in British India in the Nineteenth Century; those circumstances would not and could not have any bearing on the scope of our own Constitution. After all, much of the Constitution, and almost all of the Bill of Rights, were aimed at practices contemporaneously lawful in England.

To rely on the type of British overseas cases here discussed as a guide for the meaning of the Sixth Amendment's guarantee of a jury trial is on a par with relying on the fact that no English prisoner charged with less than treason had any right to counsel prior to 1836 (Sec. 1, St. 6 & 7 Will. IV, ch. 114) as a basis for denying full scope to the same Amendment's guarantee of the right to the effective assistance of counsel.

## IV. THE MATERIALS ADDUCED BY THE GOVERNMENT CONFIRM THE TRADITIONAL LIMITATIONS OF "IN THE FIELD" SET FORTH IN WINTHROP'S TEXT AND IN PUBLISHED OPINIONS OF THE ATTORNEY GENERAL AND THE JUDGE-ADVOCATE GENERAL OF THE ARMY.

The Government's attempts to establish a basis for the military jurisdiction which it now defends reflect, at the very least, no single consistent pattern.

At the last Term, the thread of the Government's argument was (U. S. Reid Br. 44) that "the world about which

Colonel Winthrop wrote no longer exists.'" At this Term, it evoked *The Federalist* (U. S. Supp. Br. 69-71). Now that its obvious misreading of the latter document has been exposed (Def. Supp. Br. 38-39), it once more shifts direction, and attempts to establish that Colonel Winthrop's world never existed at any time.

It now argues (U. S. 2d Reply Br. 41-58) that "in the field" was not limited to a time of hostilities, and that Winthrop was wrong when he wrote (*136; reprint, p. 101) that application of AW 63 of 1874 (Covert Br. 43) was "confined both to the period and pendency of war and to acts committed on the theatre of war."

We proceed to an examination of the Government's materials.

A. The Government points to three trials of sutlers not "in the field", in 1825, 1833, and 1838. U. S. 2d Reply Br. 51. The Government does not add, what is the fact, that this was in the period, 1821 to 1849, when the Army had no lawyers; the judge advocates provided for in Sec. 2 of the Act of April 14, 1818, c. 61, 3 Stat. 426, were dropped in the Army reorganization effected by the Act of March 2, 1821, c. 13, 3 Stat. 615, and the office of Judge Advocate of the Army was only reestablished by Sec. 4 of the Act of March 2, 1849, c. 83, 9 Stat. 351.

When the question of military jurisdiction over the post trader, successor to the sutler, was thereafter presented for a legal opinion, The Judge Advocate General held that such persons were not subject to court-martial except in the field in time of actual hostilities. See Covert Br. 46-47, where the ruling is quoted in full.

This the Government's present argument seems to be that a jurisdiction sporadically and episodically exerted, without legal scrutiny, establishes the incorrectness of a subsequent formal legal opinion which held that this jurisdiction could not legally be exercised.

Further comment would ordinarily be unnecessary, but we think it appropriate to remark that, in the nearly 500 printed pages of briefs filed by the Government since these cases were set down for argument, it has not yet made reference to, much less discussed, the published rulings of The Judge Advocate General of the Army as to the non-amenability of the post trader to court martial when not in the field. Dig. Op. JAG, 1880, p. 284; *id.*, 1895, pp. 599-600; *id.*, 1901, p. 563.

B. The Government next points to three trials by court martial of civilian employees in Utah in 1858. U. S. 2d Reply Br. 52. But it fails to establish that, in the context of the campaign in question (Rep. Sec. War, 1858 [Sen. Ex. Doc. I, part 2, 35th Cong., 2d sess.], pp. 6-8, 28-223), neither the offenses nor the trials took place while the forces were in fact "engaged in offensive or defensive operations" (14 Op. Atty. Gen. 22, 23) so as to be "in the field". Plainly, unless the Government can make such a showing, not even these isolated instances were beyond the traditional limitations.

And, in any event, the Government is demonstrably wrong when it refers to these three trials as taking place in "an organized camp in a remote place where the civil law of the United States was not functioning" (U. S. 2d Reply Br. 52). For Utah in 1858 was, and since 1850 had been, a fully organized territory, with a full complement of courts. Sec. 9 of the Act of Sept. 9, 1850, c. 51, 9 Stat. 453, 455.

C. The Government endeavors to draw comfort from scattered cases involving naval court martial jurisdiction from periods when privateering under letters of marque was still lawful, and when certain apparent civilians were deemed to have full naval status. U. S. 2d Reply Br. 48-50, 52; 55-56. It is difficult, if not impossible, to extract any settled doctrine from the isolated instances to which

reference is made, particularly since, as we have shown, the Navy never had any statutory jurisdiction over pure civilians prior to 1943, and for years operated its Guantanomo Bay base without power to try any civilians at all by naval courts. See the references collected at Covert Br. 51 and Def. Supp. Br. 62-63.

The Government's invocation of supposed maritime practice is particularly inapposite where it makes reference to the Coast Guard, prior to 1915 known as the U. S. Revenue Cutter Service, which formerly operated "public vessels manned by civilian seamen". U. S. 2d Reply Br. 49, n. 30a. The inference would appear to be that such civilians were subject to trial by court-martial. But the fact is that the Revenue Cutter Service for well over a century, from 1790 when it was founded (Secs. 62-64 of the Act of Aug. 4, 1790, c. 35, 1 Stat. 145, 175) until 1906 (Act of May 26, 1906, c. 2556, 34 Stat. 200), not only had no courts-martial of any kind, but was without any legal means of enforcing discipline on its ships. See Sen. Rep. 958 and H. R. Rep. 2749, both 59th Cong., 1st sess.

It is, we submit, dangerous to sail the seas of naval court-martial jurisdiction in the absence of adequate navigational aids.

D. This brings us to the contention (U. S. 2d Reply Br. 50-58) that the actual military practice with respect to trials by court martial was not as narrow as it was considered by Winthrop, and that the true limits of the jurisdiction was set forth in a memorandum of Judge Advocate General Holt in November 1866 (*id.* at 53).

It is to be noted that General Holt was the primary exponent of the policy of military control of political prisoners (9 *Dictionary of American Biography* 181, 182-183, s.v. Joseph Holt), so that his views as to the location of the boundary between the military and the civil jurisdiction must be read with caution, particularly where, as in

this instance; they were expressed before the delivery of the opinions in *Ex parte Milligan*, 4 Wall. 2, which were not handed down until December 17, 1866. See 18 L. Ed. 291.

When the issue of military jurisdiction over civilians was thereafter formally presented, both The Judge Advocate General of the Army and the Attorney General ruled that such jurisdiction could only be exercised in time of hostilities in the theater of hostilities. 16 Op. Atty. Gen. 13 and 48; and see, for the JAG opinions in digested form, Covert Br. 40-41, 44, and Krueger Br. 13. The opinions of The Judge Advocate General, now set forth in full (U. S. 2d Reply Br. 86-99), far from establishing the wider jurisdiction for which the Government is now contending, effectually deny it. And the full text of those opinions confirms the accuracy of Winthrop's text at *131-*138 (reprint, pp. 98-102).

To argue, as the Government does, that the reference in those opinions to trials condemned therein establishes a valid practice at variance with The Judge Advocate General's conclusions is on a par with urging that the trials of civilians by military commission that took place prior to *Ex parte Milligan*, see the references in Def. Suppl. Br. 122-124, establish the unsoundness of that decision. It is surely novel doctrine to suggest that a sporadic practice outweighs specific considered condemnation of its exercise. But that is the substance of the Government's present resort to "historical" materials.

The circumstance that the Government on the eve of the rehearing in these two cases has finally undertaken to assail the soundness of the views expressed by Colonel Winthrop may well evidence desperation. In any event, however, the materials which it adduces at this juncture are inadequate to the attempt. The views of that distinguished military lawyer, characterized by General Crowder as "the Blackstone of military law" (Covert Br. 33), far from

having been shown to be in error, are confirmed as not only accurate but as completely sound in every respect. See U. S. 2d Reply Br. 86-99.

Respectfully submitted.

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FEBRUARY 1957.